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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. BATTERTON, SECRETARY, MARYLAND DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, *et al.*,

Petitioners,

v.

ROBERT FRANCIS, *et al.*,

Respondent,

AND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITIONS FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENOR

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BRIEF FOR RESPONDENT-INTERVENOR

OPINIONS BELOW

The opinion of the Court of Appeals (Jt. App. pp. 100a-104a)[1] is not yet officially reported. The order of the federal District Court (Jt. App. pp. 79a-85a) is reported at 379 F. Supp. 78.

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[1] "Jt. App." refers to the Joint Appendix filed by the Chamber and the State of Maryland. "App." refers to the separate Appendix prepared by the Chamber, the State of Maryland, and Robert Francis and filed with the briefs.

JURISDICTION

The judgment of the Court of Appeals (Jt. App. pp. 105a-106a) was entered on September 22, 1975. On December 4, 1975, the Chief Justice extended the time in which to file petitions for a writ of certiorari to and including February 19, 1976 (Jt. App. p. 105a). Petitions by the Chamber and the State of Maryland were filed on that date, and the Court granted Maryland's petition on November 8, 1976.[2] The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal regulations, as amended, which grant states discretion to exclude persons from federal welfare benefits whose need arises solely from their participation in a labor dispute are within congressional intent as expressed in the Social Security Act.

2. Whether state regulations which tie federal welfare eligibility to state unemployment compensation law are consistent with federal welfare policy.[3]

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[2] The Court made no separate disposition of the Chamber's petition No. 75-1182.

As a party in the courts below, the Chamber is properly a party to the instant proceeding and has entered an appearance in No. 75-1181. Sup. Ct. R. 10(4). And Maryland raised and invited consideration of the contentions urged here by the Chamber. In its Petition Maryland stated (pp. 15-16): "The question as to the eligibility of strikers for payments has come to this Court before without any final resolution of that question. (citations omitted). With the involvement of the Chamber . . . as a party, it would appear that this case might be an appropriate one for resolving this separate issue." And the courts below ruled that mandatory eligibility for striking employees was *not* contrary to or inconsistent with the separate legislative systems for aiding the employed and the unemployed. (Jt. App. 103a, 18a-20a, 84a).

[3] Francis's challenge to the Maryland regulations necessitates analysis of federal unemployment compensation standards in ruling on the validity of these regulations. The Chamber has not litigated and thus takes no position on the other eligibility questions ruled on below, namely whether employees who quit or are discharged for cause are eligible for federal welfare benefits under the AFDC-UF program.

STATUTES AND RULES INVOLVED

The relevant provisions of the Social Security Act (42 U.S.C. § 601 *et seq.*), the National Labor Relations Act (29 U.S.C. § 141 *et seq.*), the Food Stamp Act (7 U.S.C. § 2011 *et seq.*) and the Railroad Employment Insurance Act (45 U.S.C. § 351 *et seq.*) are set forth in the separate Joint Appendix.

STATEMENT

A. The Strike

Robert Francis engaged in a work stoppage on July 1, 1971, when he joined a strike in support of his collective bargaining representative at the American Smelting and Refining Co. plant where he was working. On September 10, 1971, the strike ended and Robert Francis immediately returned to his job at the American Smelting and Refining Co.

During this two and one-half month strike, Francis applied to the Maryland Employment Security Agency for state unemployment benefits. The State of Maryland, pursuant to its unemployment eligibility regulations, denied Francis unemployment benefits because his unemployment was voluntary and resulted from his own decision to participate in a labor dispute in support of his collective bargaining representative.[4] Mr. Francis then sought federal benefits under the Aid for Dependent Children—Unemployed Father program (AFDC-UF).

Francis was declared ineligible for these welfare payments on the ground that such benefits need not be paid to "meet need due to being disqualified for unemployment insurance". Thereafter, Francis, on behalf of himself and all other potential

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[4] Section 6 of Maryland's Unemployment Insurance Law, Md. Ann. Code art. 95A, § 6 (1969 Repl. Vol) provides that a claimant shall be disqualified when "his unemployment is due to a stoppage of work other than a lockout, which exists because of a labor dispute. . ."

applicants similarly situated, filed an action in Federal District Court alleging that the denial of AFDC-UF benefits violated both the Equal Protection clause of the Constitution and Section 407 of the Social Security Act, 42 U.S.C. § 607 and the HEW regulations promulgated thereunder, 45 C.F.R. 223.100(a).

B. The Initial Proceedings

Pursuant to 28 U.S.C. § 2281, a three-judge court was constituted, and on August 30, 1971, the Chamber sought leave to intervene. The District Court denied the Chamber's motion to intervene as a party but allowed it to participate *amicus curiae* (Jt. App. p. 4a). The Chamber filed a separate appeal (No. 71-1554) to this Court, limited to the intervention question, which was denied "for lack of jurisdiction." 409 U.S. 907 (1972). Thereafter, the Chamber appealed the same question to the Fourth Circuit which, on June 30, 1973, ruled it had subject matter jurisdiction because "the instant appeal is from a denial of a petition for intervention and not of an injunction." (Jt. App. p. 109a). The Court of Appeals concluded only that the district court did not abuse its discretion by denying the Chamber permissive intervention (Jt. App. p. 113a).[5]

On January 28, 1972, the three-judge court issued its first decision in this proceeding (Jt. App. pp. 2a-34a). The District Court held that Maryland's eligibility regulations violated HEW guidelines (Jt. App. p. 24a), and issued a decision requiring Maryland to pay AFDC-UF benefits to all employees whose need arose solely out of a labor dispute (Jt. App. pp. 28a-29a).

[5] The Fourth Circuit noted (Jt. App. p. 112a):

"... the district court's ruling on the Chamber's *amicus* argument [that federal labor policy prevented welfare payments to strikers] was at most, mere *dicta* and not binding on anyone. The district court [in Francis I] did not rule on the merits of the Chamber's contention; its only *holding* was that the Chamber would not be permitted to intervene." (emphasis in original).

Pursuant to 28 U.S.C. § 1253, the State of Maryland appealed the three-judge court's order to the Court. On October 16, 1972, the Court affirmed the judgment below, limited only to the validity of the Maryland eligibility regulations without opinion (409 U.S. 904), apparently in reliance upon a memorandum submitted by the Solicitor General of the United States (Jt. App. pp. 56a-60a) which concluded that the case was not ripe for plenary review because the Secretary of HEW was about to amend the relevant regulations (Jt. App. p. 60a).

C. The Instant Proceedings

On July 12, 1972, the Secretary of HEW amended 45 C.F.R. 233.100(a)(1) ostensibly to permit each State to determine whether to provide AFDC-UF benefits to the children of fathers voluntarily idled from their employment because of their election to support their collective bargaining representative in a labor dispute. The Secretary specifically stated that he was neither speaking on behalf of Congress nor responding to a specific congressional mandate (Jt. App. pp. 124a-125a).

After publication of the amended HEW regulations the Chamber timely filed a motion to intervene as a party.[6] The District Court granted this motion on January 31, 1974 without restricting in any way the scope of issues raised by this litigation (Jt. App. pp. 106a-107a). The Chamber and the State of Maryland then moved to dissolve the injunction previously entered by the District Court (Jt. App. pp. 114a-116a).

On June 25, 1974, the District Court issued its opinion, denying the motions to dissolve the outstanding injunction (Jt. App. pp. 79a-85a). The Court acknowledged that its earlier opinion "literally read" encompassed the amended regulation

[6] American Smelting and Refining Co. is a member of the Chamber, and it is that company's injury, caused by direct federal financial support under the AFDC-UF program for Robert Francis and other striking employees, which permitted the Chamber to intervene in this proceeding.

issued by the Secretary on July 12, 1973 (Jt. App. p. 84a). The three-judge court now concluded with benefit of "hindsight" that the 1968 amendment to Section 407 of the Social Security Act required the Secretary to promulgate standards rather than a national definition of unemployment. Because "(the July 12, 1973) amendment established no standards for the States to follow and simply permitted each State to do as it chose" (Jt. App. p. 84a), this amendment was held to be contrary to the Secretary's authority, and thus Maryland's regulation denying federal welfare benefits to persons participating in a labor dispute remained invalid (Jt. App. p. 85a).

The Chamber and Maryland filed concurrent appeals to this Court and to the Fourth Circuit. On December 9, 1974, this Court denied Maryland's appeal, treating the papers as a petition for a writ of certiorari before judgment. 419 U.S. 1042. On January 27, 1975, the Supreme Court denied the Chamber's appeal "for lack of jurisdiction" under 28 U.S.C. § 1253. 420 U.S. 903.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, in a per curiam opinion, upheld the District Court and adopted its opinion (Jt. App. p. 103a). The Court concluded: "We affirm the decision below that Maryland may not exclude from the benefits of AFDC those children whose fathers are out of work because of a strike. . ." (Jt. App. 103a).

SUMMARY OF ARGUMENT

The instant case involves *inter alia* the validity of HEW regulations permitting states participating in the AFDC-UF welfare program the option to include or exclude fathers with dependent children whose "unemployment" results solely from the father's participation in a labor dispute. The challenged

HEW regulations and Maryland's disqualification rule assume that this class of claimants are at least technically eligible for cash benefits under this federal-state welfare program. This Court, however, has made clear that the question of the validity of state imposed limitations upon receipt of federal welfare benefits, whether or not consistent with current HEW regulations, can be reached only if it can be affirmatively established that the claimants are within the class of beneficiairies intended by Congress. *Burns* v. *Alcala,* 420 U.S. 575, 580-85(1975); *Carleson* v. *Remillard,* 406 U.S. 598, 603-04 (1972); *Townsend* v. *Swank,* 404 U.S. 282, 288-291 (1971); *King* v. *Smith,* 392 U.S. 309, 327-333 (1968); see also *Macias* v. *Finch,* 324 F. Supp. 1252, 1260-61 (N.D. Cal.) (three-judge court), *aff'd without opinion,* 400 U.S. 913 (1970). These decisions declare it unnecessary here to determine the deference, if any, to be given to the challenged HEW regulations until after the Court is satisfied Congress intended at least optional AFDC-UF eligibility for employed workers like Mr. Francis. The Secretary's authority to promulgate regulations is limited by section 1102 of the Social Security Act which requires such regulations to be consistent with federal welfare policy.

Here, it is not contended by Mr. Francis nor held by the courts below that there is any affirmative statutory language in the Social Security Act or in the legislative history of the AFDC-UF program suggesting that Congress mandated coverage for currently employed fathers whose need results solely from the temporary loss of wages attendant upon a strike against their employer. This legislative silence must be construed against eligibility for children of fathers on strike because, as this Court has repeatedly emphasized, Congress has not yet provided for the economic security of all dependent children. *Burns* v. *Alcala, supra,* 420 U.S. at 582-83 n. 9; *Carleson* v. *Remillard, supra,* 406 U.S. at 604; *King* v. *Smith, supra,* 392 U.S. at 330.

This conclusion is reinforced by reference to the federal definition of unemployment which excludes employees

participating in a labor dispute, and by reference to the limited purpose of the AFDC-UF program which was not intended to aid the currently employed worker. In delegating to the HEW Secretary the discretion to define "unemployment", Congress did not indicate the Secretary could disregard the definition of employee in Section 2(3) of the National Labor Relations Act, which expressly provides that a worker participating in a labor dispute retains his job and his employed status during the term of that dispute. Congress expressly limited the Secretary's definitional discretion by requiring that the unemployed parent program be limited to workers with a recent or substantial attachment to the work force. Congress thus implicitly required the Secretary to exclude from this program those workers like Mr. Francis who have a current and continuing attachment to the work force by their existing employment relationship with their struck employer. The Federal District Court acknowledged (Jt. App. 85a) that striking employees unlike employees who quit their jobs or are discharged do not necessarily fall within the definition of "unemployed".

The AFDC-UF program was created by Congress to aid employable but unemployed fathers with dependent children who had lost their jobs and had their relationship with their employer totally severed by impersonal business cycles and economic forces beyond their control. Congress left intact for employed workers the federal right to bargain collectively with their employer and thereby to use self-help including the strike weapon to advance their own economic security. Since Congress has not provided otherwise, the HEW Secretary's discretion to define "unemployment" must respect these separate systems constructed by Congress to aid two distinct groups of citizens. "Congress, by legislating as it has, has distinguished between the unemployed and the underemployed, and has applied different solutions to the problems of each group". *Macias* v. *Finch, supra,* 324 F. Supp. at 1260; see also *Carleson* v. *Remillard, supra,* 406 U.S. at 603; *Anchor Motor Freight* v. *Hines,* 424 U.S. 554, 563 (1976); *Chemical Wkrs.* v. *Pittsburgh*

Glass, 404 U.S. 157, 166 (1971); *Lewis* v. *Martin,* 397 U.S. 552, 559 (1969). Thus the Chamber, which supported Maryland in the courts below, contends, in addition to those arguments advanced by Maryland here, that the injunction requiring mandatory eligibility for employees on strike must be dissolved because Congress did not intend to benefit workers temporarily involved in a labor dispute.

Maryland's unemployment compensation regulations disqualify employees on strike for AFDC-UF benefits but permit both AFDC-UF and unemployment compensation payments to employees who are "locked out" by their employer during a labor dispute. The unemployment compensation system, like the AFDC-UF program, was originally designed by Congress in 1935 to aid workers without jobs rather than workers with jobs. *California Dept. of Human Resources* v. *Java,* 402 U.S. 121, 130 (1971); *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 586 (1937); *Personal Finance Co.* v. *United States,* 86 F. Supp. 779, 786 (D. Dela. 1949). Congress also, in section 903(a)(5) of the Social Security Act, imposed upon states seeking the tax credits allowed employer contributions to state unemployment compensation funds a mandatory duty of neutrality in any labor dispute involving strikes and lockouts to avoid state aid to one side or the other. This concept of neutrality was borrowed intact from the British unemployment compensation system which served as the model for the American system in order to avoid conflict and overlap with the concurrently enacted Wagner Act.

Maryland thus properly disqualifies employees whose "unemployment" results solely from their participation in a strike. However, the mandatory duty of neutrality also mandates AFDC-UF and unemployment compensation disqualification for employees who temporarily are locked out by their employer during collective bargaining because a lockout, like a strike, is simply another manifestation of a labor dispute, and Maryland's unemployment compensation regulations must be measured against this federal standard. The courts below

invalidated Maryland's disqualification provision and, if the Court reverses the judgment below and reestablishes these regulations, the Court must construe them in a manner consistent with federal welfare policy.

ARGUMENT

I. HEW HAS NO RULEMAKING AUTHORITY TO DEFINE UNEMPLOYMENT TO INCLUDE EMPLOYEES ENGAGED IN A LABOR DISPUTE

A. Introduction

The basic question presented in the instant case is the actual scope of HEW's delegated authority in section 407(a) of the Social Security Act to define unemployment under the federal-state AFDC-UF program. That is, whether Congress authorized the Secretary of HEW to fashion a definition of unemployment which could include fathers of dependent children whose "unemployment" results solely from their participation in a labor dispute. This Court has previously scrutinized HEW regulations only after first considering whether the claimants, subject to the HEW regulations, are affirmatively within the class of beneficiaries intended by Congress. Here Congress did not intend HEW to define the term unemployment so to apply to employed wage earners like Mr. Francis. Inclusion of employees involved in a labor dispute is inconsistent with the common understanding of "unemployment", is contrary to the limited aid purposes of the AFDC-UF program, and conflicts with other congressional legislation which provides for the income needs of employed persons through federal labor laws.

B. The Scope of HEW's Authority to Define Unemployment is Limited by the Purpose of the AFDC-UF Program

The initial Aid for Dependent Children program (AFDC) limited cash benefits to needy children. 49 Stat. 629 (1935). See *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 586 (1937),

Burns v. *Alcala,* 420 U.S. 575, 581 (1975); *Philbrook* v. *Glodgett,* 421 U.S. 707, 709 (1975). But not all needy children, the program was limited to children who "will not be benefited through work programs or the revival of industry." S.Rep. No 628, 74th Cong., 1st Sess., 17 (1935). Fifteen years later Congress authorized the payment of benefits to the adult relative of the dependent child, if the child met the State's need definition and had been deprived of the support of a parent by virtue of death, disability or absence from the home. 64 Stat. 551 (1950). In 1961 Congress amended these limited eligibility provisions to permit states to grant federal cash benefits to a needy child of an unemployed parent. Act of May 8, 1961, Pub. L. No. 87-31, §407, 75 Stat. 75, 42 U.S.C. §607. States electing to participate in this federal matching program were authorized to define "unemployment". S. Rep. No. 165, 87th Cong., 1st Sess. 3 (1961). In 1968 Congress withdrew this authority from the states,[7] and amended section 407(a) of the Act to read a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the (HEW) Secretary) of his father ..." But Congress did not grant HEW unlimited discretion to define unemployment, and whether the Secretary could include persons involved in a labor dispute within any "standard" is first a question of legislative intent. Congress imposed certain elements which it regarded as mandatory for any definition of unemployment, i.e. "to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force". H.R. Rep. No. 544, 90th Cong., 1st Sess. 107-108 (1967); *Macias* v. *Finch, supra,* 324 F.Supp. at 1256-57. And these expressions of definitional limitation must be examined before consideration of whether the HEW regulations properly grant optional state coverage of benefits for persons participating in a labor dispute.

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[7] See *Philbrook* v. *Glodgett, supra,* 421 U.S. at 710 n.6.

This Court has consistently followed this *modus operandi* in other cases involving claimants who have challenged state imposed limitations upon receipt of federal welfare benefits. In *Burns* v. *Alcala, supra,* the Court examined legislative history to determine whether Congress intended to include unborn children within the scope of the definition of dependent children before reaching the propriety of the relevant HEW regulations. 420 U.S. at 580-84. In the absence of any affirmative indication that Congress intended either mandatory or optional eligibility, the Court construed legislative silence against eligibility and thus found it unnecessary to decide whether the HEW regulations were valid. 420 U.S. at 584-86. In *Carleson* v. *Remillard, supra,* the Court found it necessary to consider the Act's legislative history before concluding that HEW regulations granting optional eligibility to needy children whose fathers were "absent from the home" on military service, were inconsistent with Congressional intent. 406 U.S. at 602. In *Townsend* v. *Swank, supra,* the Court first reviewed relevant congressional materials and then concluded that Illinois could not, consistent with Congressional intent, deny federal welfare aid to college students under the age of 21. 404 U.S. at 287. The Court then was able to weigh the relevant HEW regulations in the light of this legislative history, and disapproved them. 404 U.S. at 287-6 n5. And in *King* v. *Smith, supra,* the Court reviewed the relevant statutory provisions and legislative materials before deciding whether HEW could properly approve state regulations denying welfare benefits to needy children whose mothers cohabitated with a man under no legal obligation to support the child. 392 U.S. at 333 n.34.

Here a similar review of the legislative materials is required because unless Congress intended to benefit employees engaged in a labor dispute, HEW regulations interpreted as so providing are wholly extra-statutory and exceed the Secretary's rulemaking authority limited by section 1102 of the Act (42 U.S.C. §1302) which provides in part; "[t]he Secretary of (HEW) . . . shall make and publish such rules and regulations, not inconsistent with this chapter . . ."

C. Children of Fathers Involved in a Labor Dispute are Ineligible for AFDC-UF Benefits Under Section 407(a)

1. Striking Employees are not unemployed within the meaning of Section 407(a)

In 1935 Congress defined workers, like Mr. Francis, (working for employers subject to the Labor Board's jurisdiction) whose work ceases as a consequence of a labor dispute to retain their job with their employer. Section 2(3) of the National Labor Relations Act provides an "employee" is "any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment." As the Court stated in *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 233 (1963): "§2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike." The concept underlying this provision is that an otherwise on-going contract of employment has only been temporarily interrupted by a labor dispute. See 3A A. Corbin *Contracts: A Comprehensive Treatise on the Rules of Contract Law* §684 (rev. ed. 1960). Indeed, the Labor Board and the federal circuit courts agree unanimously that economic strikers like Mr. Francis retain employee status even after they have been permanently replaced, and the struck employer is required to offer such replaced strikers an opportunity to return to work whenever the permanent replacements depart. *Laidlaw Corp.* v. *NLRB,* 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied,* 397 U.S. 290 (1970); *H&F Binch Co.* v. *NLRB,* 456 F.2d 357, 363, n.5 (2d Cir. 1972) and cases there cited. See also *Reinstatement: Expanded Rights for Economic Strikers,* 58 Calif. L. Rev. 511 (1970). Otherwise workers could not exercise the protected public rights to bargain collectively with their employer and to strike their employer, "the ultimate weapon in labor's arsenal for achieving agreement on its terms"[8] without forfeiting their jobs. H.R. Conf. Rep. No.510, 80th Cong., 1st

[8] *NLRB* v. *Allis-Chalmers,* 388 U.S. 175, 181 (1967). See also section 13 of the National Labor Relations Act. 29 U.S.C. §163.

Sess. 59 (1947). Thus, Congress regarded such workers as continuing to hold their positions during the entire term of the labor dispute to prevent these public rights from becoming illusory. See, *e.g.*, *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967); *Elam* v. *NLRB*, 395 F.2d 611, 613 (D.C. Cir. 1966).

Unlike such employed workers who retain a continuing employment relationship with their employer, Congress expressly limited the AFDC-UF welfare program to unemployed workers with a recent or substantial rather than a "casual" attachment to the work force—"that is, they must have either exhausted their unemployment compensation rights or have had a year and a half of work during a 3 year period ending in the year before assistance is granted." H.R. Rep. No. 544, 90th Cong., 1st Sess. 17, 108 (1967). The Senate objected only that this restriction eliminated eligibility for those most in need of aid—persons with a long jobless history, but ultimately this limitation was accepted at conference. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57-8(1967); S. Rep. No. 744, 90th Cong., 1st Sess. 28 (1967). These documents describe a legislative concept of "unemployment" applicable only to persons currently without a job. And this is emphasized by Congress' insistence that AFDC-UF eligibility be strictly tied to incentives to improve employability. "Your committee believes that . . . virtually all unemployed fathers of AFDC children can be trained for and placed in productive employment." H.R. Rep. No. 544, 90th Cong., 1st Sess. 97 (1967).

Workers like Mr. Francis possess marketable job skills and are already engaged in productive employment in the nation's economy. And, since as a matter of legislative chronology, Congress was well aware it had legislated in 1935 to preserve a continuing employment relationship between an employer and his employees engaged in a labor dispute, this 1968 amendment to section 407(a), in the absence of any indication to the contrary, constitutes literal exclusion of Mr. Francis from the AFDC-UF program. In delegating definitional authority to HEW, Congress did not intend to include in this delegation of

authority the discretion to create optional AFDC-UF eligibility for breadwinners actively participating in the work force. Thus, the fact that a worker temporarily idled during a labor dispute may literally meet the days or hours worked criteria imposed by section 407(b)(1)(A) or promulgated by HEW (employed less than 30 hours a week) is not controlling. "[I]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 479 (1892). See also *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 714; *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 67 (1964); *Welsh* v. *United States*, 398 U.S. 333, 347 (1970) (J. Harlan concurring).

2. The Limited Scope of the AFDC-UF Program also Restricts HEW's Discretion to Define "Unemployment"

Section 401 of the Social Security Act, entitled "Authorization of Appropriations," explains the purpose of the AFDC program (of which AFDC-UF is a part). *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 709-11. This cash benefit assistance is:

> to help maintain and strengthen family life and *to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection*, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purpose of this part". (Emphasis supplied).

An employee participating in a labor dispute, however, does not ordinarily require aid in attaining or retaining self-support capability. He is an active participating member of the work force not a part of the chronic unemployed. He also possesses sufficient job skills to perform the work he leaves when he elects to strike. Any hardship to his home environment arises solely from the decision to support a strike, not because he totally lost employment by the operation of economic forces beyond his control. Hardship arising as a

consequence of the free exercise of economic weapons is an accepted ingredient of the collective bargaining process. It is precisely this form of economic pressure which Congress believed would lead to mutually acceptable collective bargaining agreements between employers and their employees. R. Mathews, *Labor Relations and the Law* 363 (1953); *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576, 582 (7th Cir. 1951). This Court has repeatedly recognized this fundamental premise of national labor policy. "[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *Am. Ship Bldg.* v. *NLRB*, 380 U.S. 300, 309 (1965). "[T]here is nothing in the [National Labor Relations] Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." *Id.* at 313. "[T]he [National Labor Relations] Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak. . . ." *Porter Co.* v. *NLRB*, 397 U.S. 99, 109 (1970). "[T]he likely duration of the strike may increase the specter of hardship to [the striker's] family. . . ." *NLRB* v. *Granite State Jt. Bd.*, 409 U.S. 213, 217 (1972). Even when the strike or other economic weapons are not resorted to, collective bargaining is by its nature "an annealing process, hammered out under the most severe and competing forces and counteracting pressures." *NLRB* v. *Dalton Brick & Tile Corp.*, 301 F.2d 886, 895 (5th Cir. 1962). [9]

There is nothing in section 401 of the Social Security Act or its legislative history which even suggests that Congress intended to make federal welfare funds available to economically sufficient workers whose need arises solely from their exercise of

[9] See also N. Chamberlain & J. Kuhn, *Collective Bargaining* 393-94 (2d. ed. 1965); D. Bok & J. Dunlop, *Labor and the American Community* 229 (1970); Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 1297, 1317 (1954).

economic weapons during collective bargaining. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1969). [10]

Nor was the AFDC-UF program created to benefit employees who engaged in a work stoppage during a labor dispute. In 1961, Congress for the first time created benefit eligibility for an unemployed father living at home with a dependent child (AFDC-UF). "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance. . . ." S. Rep. No. 165, 87th Cong., 1st Sess. 1 (1961). This amendment was not designed to provision striking employees with children. Rather, Congress chose to relieve need specifically occasioned by widespread unemployment caused, not by labor dsiputes, but by the 1959-60 economic recession. Congress also desired to eliminate any financial incentive for the father to abandon the home to render the child eligible for benefits. Hearings on H.R. 3854 and H.R. 3865 before the House Committee on Ways and Means, 87th Cong., 1st Sess. 94-95 (1961); 107 Cong. Rec. 1677, 1679 (1961) (Message of Pres. Kennedy); 107 Cong. Rec. 3759-60 (1961) (Remarks of Cong. Mills). This amendment then was a response to a particular need and was fashioned primarily to aid "employable" fathers who *involuntarily* lost jobs by operation of recessionary business cycles, and who needed financial assistance to maintain a family while actively seeking to re-enter the work force. 107 Cong. Rec. 3767-3768 (1961) (Remarks of Cong. Byrnes); S.

[10] The only reference to or support for eligibility for striking employees during the 1934-5 hearings came in a Statement of the Communist Party before the House Labor Committee. The Communist Party asked for "guarantees" to prevent "the withholding of benefits from workers who have gone on strike." House Labor Subcommittee Hearings 1217, reprinted, *Statutory History of the United States: Income Security* 138 (Yale, 1970). There is no language in the Social Security Act of 1935 or as amended which even hints such "guarantees" were enacted or approved.

Rep. No. 165, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 1414, 87th Cong., 2d Sess. 15 (1962). [11]

Eligibility for employees like Mr. Francis whose financial need arises solely out of their support for a strike, is wholly inconsistent with this legislative purpose because it was involuntary unemployment which totally separated the worker from the job market which Congress sought to provide for. As one commentator has summarized:

> strikers clearly do not fit within any of the categories of unemployed persons whom Congress attempted to assist through the AFDC-U[F] program. A striker's unemployment is not directly caused by recession or inability to learn and hold a job. Rather, its results from the use of economic pressure to break a dead lock in collective bargaining.

Note, *Welfare for Strikers*, 39 U. Chi. L. Rev. 79, 90 (1972).

This incongruity is emphasized when one considers other 1968 amendments to the AFDC and AFDC-UF programs. Congress declared its commitment to a federal welfare program designed to reduce dependency on welfare and to transform the unemployed into employable and productive citizens by creating incentives to improve employability. H.R. Rep. No. 544,

[11] Unlike the sudden impact of impersonal economic forces, the decision to strike is one within the control of each individual worker whether or not a union member. Unions can not lawfully impose discipline or secure the discharge of non-members who elect to work during a strike. *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085-87 (9th Cir. 1975); *Local 649, Boilermakers* v. *NLRB*, 466 F.2d 343, 344-45 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 976 (1973); *NLRB* v. *Phila. Iron Wks.*, 211 F.2d 937, 941 (3d Cir. 1954). And union members can avoid fiscal penalties by simply resigning union membership prior to the strike, or prior to the time the employee desires to return to work. *Lodge 405, Machinists* v. *NLRB*, 412 U.S. 84, 88 (1973); *NLRB* v. *Granite State Jt. Bd., supra*, 409 U.S. at 217. Moreover, resignation does not necessarily result in forfeiture of union financed funds. Contract and property rights preserve individual interests in such funds. See Note, *Union Power To Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1568-69n. 187 (1973).

90th Cong., 1st Sess. 3, 16, 107 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 4, 145-46 (1967); H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 58-9 (1967). [12] Thus the Federal Work Incentive Program (WIN), requiring benefit applicants to seek work or be amenable to job training in order to establish and maintain eligibility, was incorporated into the AFDC-UF statute. 81 Stat. 877, 42 U.S.C. § 606(b)(2) (1968). Since employees temporarily engaged in a work stoppage during a labor dispute possess marketable job skills and a current job by virtue of their continuing employment relationship with their employer, these amendments are an incontrovertible indication that the type of unemployment which concerned Congress in these amendments was poles apart from temporary work loss associated with a labor dispute.

When Congress has authorized federal funds to be paid employees engaged in a labor dispute, it has done so expressly. In 1938 Congress removed railroad workers from the state unemployment compensation provisions and in section 204(a-2)(iii) (45 U.S.C. § 354(a-2)(iii)) of the Railroad Unemployment Insurance Act created a federal reserve of payments to these workers while on strike *if* their strike was not contrary to the Railway Labor Act [13] or union rules. But this legislative change was not made because of concern for the financial needs of these employees during labor disputes, but to create an economic incentive for these workers to support peaceful

[12] Congress further provided that the failure of an employable individual to conform to the work requirement would terminate benefits if an offer of employment or enrollment in a training program was rejected "without good cause". 42 U.S.C. §§ 602 (a)(19)(F), 607 (b)(1)(B), 607 (b)(2)(C)(i). See also *Philbrook* v. *Glodgett, supra*, 421 U.S. at 710-11.

Consistent with these amendments, the Secretary of HEW limited a bona fide refusal to accept employment to substandard wages, physical inability to perform the job and unsafe working conditions. Appendix B, Regulation Section 233.100 Title 45, C.F.R. Ch. II, Sec. 233.100. The Secretary apparently found no basis in the absence of supportive legislative intent to include being involved in a labor dispute as another valid reason to refuse available employment.

[13] 44 Stat. 577 (1926), 45 U.S.C. §§ 151-163.

resolution of disputes and to discourage resort to "wildcat" strikes in one industry vital to the public interest. *Bhd. of Railway Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 42-3 (D.C. Cir. 1956). And in the Food Stamp Act [14] Congress condoned receipt of federal money to purchase food stamps for persons engaged in a labor dispute. As originally enacted, this Act was not generally understood by Congress to provide eligibility for strikers. See 116 Cong. Rec. 42,015 (1970) (Remarks of Cong. Abbitt). Nor was it enacted for this purpose. One purpose was to aid farmers by creating another outlet for farm surplus "to strengthen our agricultural economy." Section 1(7 U.S.C. § 2011). However, in the absence of express language disqualifying strikers, an increasingly large number of striking employees were able to obtain benefits. In 1968, 1970 and 1973 Congress rejected efforts in the House and Senate to disqualify strikers from receiving benefits. These rejections were not, however, premised upon the merits of whether food stamps for strikers was consistent with federal welfare policy. Instead rejection of the proposed striker disqualification arose from a political trade-off between proponents of farm subsidies and opponents of a specific striker disqualification. As Senator Humphrey stated: "I simply say to my colleagues, if you want a farm bill, you must vote down (the striker disqualification) amendment (to the Food Stamp Act) . . . ." 119 Cong. Rec. 26,909 (1973) (Remarks of Sen. Humphrey); see also 119 Cong. Rec. 26,910 (Remarks of Sen. Nelson); 114 Cong. Rec. 28,314 (1968), 116 Cong. Rec. 42,035 (1970). Thus, Congress has at least condoned and accepted limited subsistence federal aid to strikers in this legislation which is outside the purposes of the Social Security Act.

In light of these payment programs, it is reasonable to conclude that if Congress had intended similar eligibility in the AFDC-UF it likely would have done so expressly rather than through the term "unemployed"—a term wholly inapplicable to a worker engaged in a labor dispute. Cf. *Burns* v. *Alcala, supra*, 420 U.S. at 584. In sum, the limited purpose of the

[14] 78 Stat. 703 (1964), 7 U.S.C. §§ 2011, *et seq.*

AFDC-UF program itself demonstrates that Congress gave no thought to including in this program dependent children of fathers engaged in a temporary work stoppage. And thus Congress in 1968 conferred no authority upon HEW to define "unemployment" so as to enroll such fathers because their inclusion is beyond the objectives and purposes to be achieved by this legislation. Cf. *United States* v. *Bishop*, 412 U.S. 346, 356 (1973); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288-89 (1957). [15]

3. Federal Labor Laws Limit HEW's Discretion to Provide Optional Eligibility for Employed Workers

Congress has distinguished between those out of work and those holding jobs and has created different and separate means of aiding their economic welfare. As Judge Duniway stated in *Macias* v. *Finch, supra*, 324 U.S. F. Supp. at 1260:

> Congress by legislating as it has, has distinguished between the unemployed and the

[15] In light of this legislative history, the defeat of several legislative efforts since 1968 to specifically exclude strikers' coverage under the AFDC-UF program is not determinative evidence that Congress intended to authorize such eligibility. H.R. 6004, 92d Cong., 1st Sess. (1971) (not reported out of committee); amendment to H.R. 1, 92d Cong., 1st Sess., § 448, 1971 (defeated); S. Rep No. 92-1230, 92d Cong. 2d Sess. 108, 472-73 (1972) (amendment deleted before bill voted on the Senate floor). Rather, it is at least as plausible to infer that these amendments originated out of congressional awareness of erroneous interpretations of the purposes of this program, and therefore simply constitute an effort to clarify the original congressional intent. "It would be equally plausible to suppose that (the drafters) thought HEW had misinterpreted the Act and wanted to make the original intent clear". *Burns* v. *Alcala, supra*, 420 U.S. at 586 n.12.

The remarks of Congressman Mills (107 Cong. Rec. 3766) (1961)) that "it is possible" that states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute are not to the contrary. Whatever Mr. Mills may have thought in 1961 about eligibility under the experimental AFDC-UF program, the 1968 amendments, as shown above, superseded the states' authority to define unemployment and redefined unemployment so as to exclude those out of work solely due to a labor dispute.

underemployed, and has applied different solutions to the problems of each group.

As we have shown, *supra*, pp. 15-19, the Social Security Act provides no implication whatever as originally enacted in 1935 or as amended that Congress was concerned about the hardships to children of employees resulting from the exercise of economic weapons during bargaining disputes. The economic adversity, if any, suffered as a result of a labor dispute was not the type of misfortune which Congress intended to mitigate by direct federal financial assistance. Congress intended the AFDC-UF program to protect children and the nuclear family from the total employment disruption caused by the impersonal operation of recessionary business cycles.

For the "working man" (*Chemical Wkrs.* v. *Pittsburgh Glass*, 404 U.S. 157, 166 (1971)), it was Congress' judgment in 1935 that redressing the inequitable balance of bargaining power between employer and employee by protecting the wage earner's right to strike and bargain collectively would concurrently reduce industrial strife and improve wages. 29 U.S.C. §141.[16] See also *Anchor Motor Freight* v. *Hines*, 424 U.S. 554, 563 (1976) (federal labor laws seek to strengthen the bargaining position of the average worker in an industrial economy). Congress also sought "to aid the unprotected, unorganized and lowest paid of the nation's working population" (*Brooklyn*

[16] Section 1 of the NLRA, entitled "Findings and Policies" provides in pertinent part: The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Bank v. *O'Neil*, 324 U.S. 697, 707n.18 (1945)) through the Fair Labor Standards Act.[17]

The *temporary* loss of wages resulting from the exercise of the federal right to strike is not sufficient to transform the self-sufficient breadwinner into a proper recipient of federal welfare benefit. This Court noted the difference between these separate federal systems for aiding the economic well being of two distinct groups of citizens in *Carleson* v. *Remillard*, *supra*. There, the Court's holding expressed through Mr. Justice Douglas that children of fathers away from the home on military service were eligible for federal AFDC benefits was based in significant part on the rationale that, unlike union represented employees in the private sector like Mr. Francis, personnel on active military service are without access to a union or to collective bargaining to assist the advancement of their economic circumstances. 406 U.S. at 603. Respect for and recognition of this legislative judgment also requires the conclusion that Congress did not intend HEW to define "unemployment" to permit optional AFDC-UF benefits for workers engaged in a labor dispute.

[17] Act of June 25, 1938 c 676, 52 Stat. 1060, 29 U.S.C. §§ 201 *et seq.* Section 2(a) and (b) provides:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Congress also legislated the distinction between "unemployment" and "underemployed" persons in the unemployment compensation provisions of the 1935 Social Security Act to harmonize these provisions with the currently enacted Wagner Act. [18]

In *California Dept. of Human Resources* v. *Java*, 402 U.S. 121, 130 (1971), the Court reviewed the legislative history of the unemployment compensation provisions of the 1935 Social Security Act (42 U.S.C. §§ 501-503) and stated: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." The type of unemployment subject to compensation was not that related in any way to labor disputes, but was limited like the later AFDC-UF program to workers who, during periods of economic stress, have their contract of employment completely and suddenly severed by the unpredictable operation of recessionary business cycles and the fluctuation of production demands. H.R. Doc. No. 81, 74th Cong., 1st Sess. 8 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess. 3, 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935). The unemployment compensation program was one response to the Great Depression which caused unprecedented severance of employment relationships. "The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve." *Steward Mach. Co.* v. *Davis, supra,* 301 U.S. at 586 (per J. Cardozo). "Clearly the (Social Security Act) was intended to care for periods of economic stress when workers through no fault of their own, were unable to find employment." *Personal Finance Co.* v. *United States,* 86 F. Supp. 779, 786 (D. Dela. 1949). As the Federal Relief Administrator testified, unemployment compensation relief "covers a great many thousands of people who are thrown out of work suddenly." Hearings on H.R. 4120 before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 214 (1935).

[18] The Wagner Act was signed into law by President Roosevelt on July 5, 1935; the Social Security Act became law on August 14, 1935.

Not only did Congress limit unemployment compensation to workers without jobs, but Congress also expressly imposed a mandatory duty of neutrality in labor disputes upon the participating states to assure these benefits would not adversely affect the collective bargaining scheme established in the concurrently enacted Wagner Act. In section 903(a)(5) of the Social Security Act (now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3308), Congress provided that out of work claimants could not be denied benefits if they refused to accept employment at a plant where a strike or lockout was in progress, or refused to work for wages and benefits below area standards, or declined to forego the federal right established just one month earlier to join a labor organization. [19]

The Social Security Board in its general advisory role, formulated in 1936 a model bill for adoption by the states which included these standards as well as a provision which specifically disqualified individuals whose unemployment "is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or premises at which he is or was last employed." *Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types,* § 1(5) (1936). [20] This later provision is especially significant in light of the fact that the independent Social Security Board was presumably aware of

[19] This provision provides in *hace verba*:

Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout, or other labor disputes; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. § 3304 (a)(5).

[20] This provision was inapplicable to claimants who were not "directly interested in the labor dispute which caused the stoppage of work" or who were not members of a "grade or class of workers" employed at the premises immediately prior to the work stoppage. *Social Security Board, Id.*

the legislative history and background of the Social Security Act and undertook in its advisory role to follow the will of Congress. This provision read in a common sense fashion literally precludes the availablility of unemployment compensation to workers who stop work because of a labor dispute regardless of whether a strike or lockout occurs. This disqualification was essential to harmonize the unemployment compensation system with federal labor policy, to avoid large incursions into limited compensation funds, and to maintain state neutrality in labor disputes. See Manpower Admin. U.S. Dept. of Labor, Comparison of State Unemployment Ins. Laws 4-10 (3rd rev. ed. Sept. 1, 1973).

Of course, Congress allowed the states considerable latitude in fashioning unemployment compensation statutes. [21] But as the legislative history and the model bill of the Social Security Board make plain, local experimentation was limited to means of funding and methods for providing tax credits. S. Rep. No. 628, 74th Cong., 1st Sess. 13-14 (1935); 79 Cong. Rec. 5782 (1935) (Remarks of Sen. Wagner). The cardinal principle that benefits should not affect the newly established labor relations system was not subject to local reevaluation. As Mr. Justice Cardozo stated in *Steward Mach. Co.* v. *Davis, supra,* 301 U.S. at 594: "What (the states) may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental."

To be sure Congress did not specifically ban the states from providing such availability, but in light of the contemporary Wagner Act, a specific direction of prohibition would have been superfluous. Moreover, this omission was natural because

[21] Some members of the Roosevelt Administration believed the role of the states in any unemployment compensation system had to be considerable in order to provide some financial assistance if any extensively regulated federal system was declared unconstitutional by the Supreme Court. Indeed, while Congress was considering the Social Security Act, the Supreme Court decreed the demise of the National Industrial Recovery Act. (48 Stat. 195 (1933)) in *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (May 27, 1935). See also A. Schlesinger, *The Coming of the New Deal,* 305-6 (1958).

Congress was not, in 1935, legislating against a background of general state created labor dispute eligibility for unemployment compensation. Compare *Munn* v. *Illinois,* 94 U.S. 113 (1877). Prior to 1935 Wisconsin was the only state which had legislated an unemployment compensation system, but its operation was delayed and abandoned pending Congressional consideration of a federal system. See R. Hoar, *Wisconsin Unemployment Insurance* (1934); Larson and Murray, "The Development of Unemployment Insurance in the United States", 8 Vand. L. Rev. 181, 184-86 (1955). Since employees were not then eligible or actually receiving unemployment compensation benefits under state programs when they engaged a work stoppage, it was unnecessary for Congress specifically to proscribe such a disqualification.[22] And in 1970 Congress specifically reaffirmed

[22] This conclusion is not undermined by the failure of Congress in 1969 to enact a specific disqualification for striking employees proposed by President Nixon, or by Congressman Mills' views during debate on other proposed amendments that states could use their own funds to pay benefits to employees on strike. 115 Cong. Rec. 34,106 (1969) (Remarks of Cong. Mills). No such disqualification was needed because Congress simply reaffirmed, in the unemployment compensation amendments enacted in 1970, the original limited 1935 policy that compensation should only go to those actually unemployed as a result of economic stress. Mr. Mills' 1969 views about that 1935 policy are thus erroneous and because he was not a member of Congress until 1939, his views certainly don't reflect a general consensus that unemployment in the House and Senate should be provided to employees. See *United States* v. *Wise,* 370 U.S. 405, 414 (1962). Indeed Congress has not rendered all unemployed persons eligible for unemployment compensation. The 1969 amendments extended coverage to only 4.4 million of the 16.6 million jobs unprotected by compensation eligibility. S. Rep. No. 91-752, 91st Cong., 2d Sess. 3 (1970). In the absence of comprehensive coverage, the failure of Congress to enact an amendment to specifically exclude employees involved in a labor dispute from unemployment compensation supports the opposite inference, namely that Congress intended to clarify the original intent that such workers were barred from eligibility by the requirement that states observe strict neutrality in labor disputes. *Burns* v. *Alcala, supra,* 420 U.S. at 566.

that unemployment compensation was limited to victims of impersonal economic forces. The Senate Finance Committee stated:

> Over the years, the unemployment compensation program has provided a continuing income to millions of men and women in periods of unemployment. The program has also added a stability to national economy that has moderated, and on occasion perhaps even averted, economic recession.
>
> The committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own unemployment, without undermining the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control.

S. Rep. No. 91-752, 91st Cong., 2d Sess. 1, 24 (1970).

In sum Congress has consistently created two distinct systems to aid separate segments of the population, and has permitted an overlap only by express legislative directive. Since Congress has given no affirmative indication that AFDC-UF benefits should be given to employees participating in a labor dispute, the courts below erred in including Mr. Francis within the HEW definition of "unemployment". [23]

[23] *Ohio Bureau of Employment Services* v. *Hodary, probable jurisdiction noted,* ____ U.S. ____, 97 S. Ct. 53-4 (1976) (No. 75-1707) also presents issues directly related to unemployment compensation payment and the states' duty of neutrality during labor disputes. The Court may thus profitably hear argument in that and the instant case in tandem.

II. MARYLAND'S DISQUALIFICATION PROVISIONS PROPERLY DENY AFDC-UF BENEFITS TO STRIKING EMPLOYEES. BUT IMPROPERLY CONFER THESE BENEFITS UPON LOCKED OUT EMPLOYEES

A. Introduction

Maryland's unemployment compensation law disqualifies claimants whose work stoppage results from a strike but authorizes benefit eligibility if the work stoppage occurs as a result of lockout. See n.4, *infra.* Thus, locked out employees are eligible for AFDC-UF cash payments because they are eligible for unemployment compensation under Maryland's lockout exemption statute. Whether on strike or locked out employees are still engaged in a labor dispute and retain their protected status under the National Labor Relations Act. If the Court agrees that Congress did not intend workers participating in a labor dispute to shift any economic hardship resulting from the exercise of collective bargaining rights to the public through the AFDC-UF program, then Maryland's unemployment compensation regulations are valid with respect to the striker disqualification, but invalid with respect to the exception granted employees locked out by their employer during a labor dispute. This lockout exemption is invalid because it violates Maryland's federally imposed obligation of neutrality in labor disputes, and state eligibility standards under the AFDC-UF program must be consistent with federal standards. *E.g, Carleson* v. *Remillard, supra,* 406 U.S. at 600.

B. The Duty of Neutrality in Labor Disputes is Equally Applicable to All Work Stoppages Regardless of Cause

In 1932, Congress broadly defined a "labor dispute" in order to restrict federal court intervention in such disputes. Section 13(c) (29 U.S.C. § 113(c)) of the Norris-La Guardia

Act [24] defines this term to expressly include the collective bargaining dispute which led to Mr. Francis' work stoppage:

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

In Section 2(9) of the Wagner Act, Congress reenacted this broad definition [25], and decisions of this and other Courts reflect that this term has been given a broad interpretation. *E.g., NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15-16 (1962); *Sachs* v. *Plumbers, Local 481*, 454 F.2d 879, 883 (4th Cir. 1972) ("The mark of a labor dispute is the presence of economic adversaries"). Significantly, Congress specifically included a "lockout" as a "labor dispute" within the states duty of neutrality in the Social Security Act (26 U.S.C. § 3304 (a) (5) (A)), thereby declining to draw any distinction between a strike and a lockout. This is reasonable because a lockout, like a strike, is simply another manifestation of a labor dispute, which Congress has twice defined to include a collective bargaining dispute. Thus in either case the states must occupy a completely neutral position. *NLRB* v. *Wire Prods. Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir. 1973). A lockout does not terminate the employer-employee relationship. "(A lockout) differs from a discharge in the same way that a strike differs from resigning or quiting work." The Restatement of Torts §

[24] Act of March 23, 1932 c. 90, 47 Stat. 70, 29 U.S.C. §§ 101 *et seq.*

[25] The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. 29 U.S.C. § 152(9).

787 Comment a (1939). Just as Congress used a broad definition of labor dispute in the Norris-La Guardia Act to insulate such disputes from the federal judiciary, Congress incorporated this same definition into the Social Security Act to keep states from aiding either side in a labor dispute.

The American unemployment compensation system described *supra*, pp. 25-28, was borrowed from the British system established in 1911. Like our scheme the British objective was to provide " 'a substantial allowance to those whose unemployment results from industrial causes beyond the control of the individual.' " Beveridge, *The Past and Present of Unemployment Insurance* 7 (London 1930). And, as we have seen Congress in Section 903(a)(5) of the Act and the Social Security Board in the model bill described above also included the essential feature of the British system—a broad labor dispute disqualification provision. Thus, under the British system a striking employee is ineligible for unemployment compensation unless he is permanently replaced or his vacant job is totally eliminated. M. Hughes, *Principals Underlying Labor-Dispute Disqualifications* 26 (1946). And the English decisions are uniform in holding that a lockout is also a trade dispute which triggers the labor dispute disqualification provision. An illustrative opinion (Umpire Decision No. 5117, April 19, 1928 pp. 364-365) states:

> If the question had in this case been raised for the first time I should have had to decide for myself whether a stoppage of work brought about by a lockout at a factory at which there was not otherwise a dispute, but which was declared in support of one of the parties to a trade dispute at another factory, is a stoppage of work which is due to a trade dispute at the factory from which the employees are so locked out, but the question has already been decided by the Umpire in a number of cases, and I do not feel at liberty (whatever my own opinion unaided by the wisdom of any predecessor might have been) to

> depart from those decisions. In several cases on the Act of 1911 the Umpire in similar circumstances decided that the "lock-out in itself constitutes a trade dispute" or "extended the trade dispute" to the premises at which the lock-out was declared. This principle he applied in Decisions 336 and 1753 (Benefit, 1911 Act). 2170, 2239, 3793 (O.W.D.) and 437 among others.
>
> The construction put upon the Act of 1911 by the Umpire was well known at the time of the passing of the Act of 1920, and I must assume that, when reenacting in the Act of 1920 the trade dispute section of the Act of 1911, Parliament intended that the later Act should be construed in the same way that the earlier Act had been construed.

Both nations have imposed careful safeguards to limit unemployment payments to those out of work by excluding workers idled only by their participation in a labor dispute. Congress did not intend the states to have the option of providing either AFDC-UF or unemployment compensation to employees engaged in a labor dispute. Thus Maryland's regulations are invalid to the extent locked-out employees can receive either cash AFDC-UF benefits or unemployment compensation because they violate the federal standard of strict governmental neutrality during labor disputes and expand to AFDC-UF program beyond its limited purpose.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

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